STATE OF MICHIGAN

COURT OF APPEALS

STANLEY FRANKEL and JUDITH FRANKEL, Plaintiffs/Counter-Defendants-Appellants, and SUMMIT ASSOCIATES, LTD., LLC, and ROBERT W. FREEMAN, as Trustee for the ROBERT W. FREEMAN TRUST, Plaintiffs/Counter-Defendants, v LAPEER COUNTY ROAD COMMISSION, Defendant/Counter-Plaintiff-Appellee.	UNPUBLISHED January 28, 2014 No. 311122 Lapeer Circuit Court LC No. 10-043298-CH

Before: STEPHENS, P.J., and M. J. KELLY and RIORDAN, JJ.

PER CURIAM.

Plaintiffs, Stanley Frankel and Judith Frankel,[1] appeal as of right the trial court order granting summary disposition in favor of defendant pursuant to MCR 2.116(C)(10), in this property dispute. We reverse and remand for further proceedings.

I. FACTUAL BACKGROUND

Plaintiffs own over 160 acres of land in Lapeer County, which they purchased in 1988. The right of way that is the subject of this lawsuit begins at the northern boundary of plaintiffs' property, and runs south from Casey Road to bisect plaintiffs' property. The nature of the right of way varies; it is partly flat and partly wooded, partly covered with water and partly covered by swamp, and other parts are rocky, washed out, and impassable. The right of way was certified

[1] Because only these plaintiffs appealed, "plaintiffs" will refer to the Frankels.

by defendant, the Lapeer County Road Commission, in 1936. However, defendant decertified it at some point between 1939 and 1941, and had no records indicating that it performed any maintenance since that time.

In 1989, plaintiffs erected a fence and gate across the right of way. Over 20 years later in 2010, defendant sent a letter to plaintiffs demanding that the fence and gate be removed. Plaintiffs refused, and filed the instant lawsuit asserting common-law abandonment. Defendant responded and filed a counterclaim, seeking damages pursuant to MCL 247.171 and MCL 247.172.[2]

The parties filed competing motions for summary disposition under MCR 2.116(C)(10). After hearing arguments regarding the respective motions, the trial court entered an order granting summary disposition in favor of defendant. The trial court held that plaintiffs had not demonstrated a question of fact regarding whether defendant expressed an affirmative intent to abandon the right of way. The trial court also found that plaintiffs violated MCL 247.171, and accordingly, ordered plaintiffs to remove the obstruction pursuant to MCL 247.172. Plaintiffs now appeal.

II. SUMMARY DISPOSITION

A. STANDARD OF REVIEW

A grant or denial of a motion for summary disposition under MCR 2.116(C)(10) is reviewed de novo. *MEEMIC Ins Co v DTE Energy Co*, 292 Mich App 278, 280; 807 NW2d 407 (2011). The motion for summary disposition "tests the factual support for a claim and should be granted if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Id.* "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). In reviewing a motion for summary disposition under MCR 2.116(C)(10), a court considers "affidavits, pleadings, depositions, admissions, and other documentary evidence submitted by the parties in the light most favorable to the party opposing the motion." *Greene v A P Prods, Ltd*, 475 Mich 502, 507; 717 NW2d 855 (2006) (quotation marks and citations omitted). This Court considers only "what was properly presented to the trial court before its decision on the motion." *Pena v Ingham Co Rd Comm*, 255 Mich App 299, 310; 660 NW2d 351 (2003).

B. INTENT TO ABANDON

[2] Under MCL 247.171, an individual may not place a fence or other encroachment upon a public highway. If such an encroachment is placed upon a public highway, the commission with jurisdiction over that highway may order the encroachment removed. MCL 247.172 allows the commission to remove an encroachment if it is not removed after 30 days of a demand made under MCL 247.171, at the individual's expense. We note that neither party raises issues pertaining to these statutes on appeal.

Plaintiffs first argue that the trial court erred in finding that there is no genuine issue of material fact regarding defendant's intent to abandon the right of way. We agree.

Of initial significance is that the trial court had jurisdiction to hear plaintiffs' claim of abandonment. This Court has previously rejected a contention that MCL 224.18 removes claims of abandonment asserted against a county road commission from the jurisdiction of the courts. *Ambs v Kalamazoo Co Rd Comm*, 255 Mich App 637, 651; 662 NW2d 424 (2003). Under *Ambs*, a county road commission may abandon a road through common-law abandonment. *Id.* at 643-651. While the trial court's statements at the motion hearing may have been unclear, in its written order the court clarified that it was analyzing plaintiffs' claim of common-law abandonment. See *Brausch v Brausch*, 283 Mich App 339, 353; 770 NW2d 77 (2009) ("It is well settled that a court only speaks through written judgments and orders.").[3]

"A roadway established for public use may cease to be such by voluntary abandonment and nonuse." *Ambs*, 255 Mich App at 652. "To prove such abandonment, both an intent to relinquish the property and external acts putting that intention into effect must be shown by the party asserting abandonment." *Id.* Mere nonuse is insufficient to prove abandonment. *Sparling Plastic Indus, Inc v Sparling*, 229 Mich App 704, 718; 583 NW2d 232 (1998). "Rather, nonuse must be accompanied by some act showing a clear intent to abandon." *Ludington & N Ry v Epworth Assembly*, 188 Mich App 25, 33; 468 NW2d 884 (1991).

Contrary to the trial court's ruling, plaintiffs have presented a genuine issue of material fact regarding defendant's intent to abandon the right of way and acts in conformity thereof. When viewed in isolation, defendant's failure to maintain the right of way or failure to object to plaintiffs' fence and gate is insufficient to prove intent to abandon. See *Villadsen v Mason Co Rd Comm*, 268 Mich App 287, 304; 706 NW2d 897 (2005) (the "failure to improve, maintain, or make the road reasonably passable, as well as the placement of signs at each end of the disputed portion of the road," is insufficient evidence of external acts proving an intent to abandon). However, those are not the only relevant facts, and we view the evidence in its entirety. *Ambs*, 255 Mich App at 653-655.

Here, defendant engaged in affirmative conduct when it decertified the right of way approximately 70 years ago. In the following seven decades, defendant determined annually which roads to certify, and decided not to certify this right of way. This decision proclaimed defendant's intent to eschew the duty to maintain the right of way, which is suggestive of an intent to abandon and external act in conformity with that intent. See MCL 224.20 (delineating the process the county road commission follows to obtain funding for roads). Defendant's conduct in the ensuing 70 years is consistent with that intent.

Therefore, the totality of the evidence reveals that defendant undertook the affirmative election not to certify the right of way, failed to maintain the right of way for those same 70 years, and failed to object to the assertion of private interests when plaintiffs erected the gate and fence for 20 years. See *Ambs*, 255 Mich App at 653-655 (upholding a trial court's finding of

[3] Defendant raises no challenge on appeal regarding whether *Ambs* was correctly decided.

abandonment based on the collective conduct of the defendant road commission, which included decertification, lack of maintenance, assertion of control by the plaintiffs, and express denials of responsibility).[4] Although one of these factors alone, such as decertification, may have been insufficient evidence of intent to abandon, considering defendant's overall conduct, there is at least a question of material fact regarding whether it intended to abandon the right of way. See *Ambs*, 255 Mich App at 653-655.[5]

While defendant relies on *Villadsen*, 268 Mich App at 304, that case is factually distinguishable, as it does not involve certification.[6] Defendant, however, highlights statements of the Chief Financial Officer (CFO) of the Lapeer County Road Commission that decertification is not tantamount to abandonment, that defendant was unaware of plaintiffs' gate and fence until 2010, defendant's letters to plaintiffs directing them to remove the gate and fence, and other "practical and public policy" considerations. At most, this evidence creates a question of fact regarding defendant's intent to abandon the right of way and external acts in conformity. In the context of a motion for summary disposition, "a court may not weigh the evidence before it or make findings of fact; *if the evidence before it is conflicting*, summary disposition is improper." *Lysogorski v Bridgeport Charter Twp*, 256 Mich App 297, 299; 662 NW2d 108 (2003) (emphasis in original) (quotation marks and citation omitted).

C. PUBLIC USE

Defendant alternatively argues that plaintiffs failed to demonstrate abandonment because the public uses the right of way. However, there is a genuine issue of material fact regarding whether the public use of the right of way was anything more than infrequent or sporadic.

Current and frequent use of a public roadway will preclude a finding of abandonment. *Ambs*, 255 Mich App at 657-658. To prove such use in the instant case, defendant relies on affidavits of four individuals claiming to use the right of way adjoining plaintiffs' property for horseback riding.[7] However, these affidavits demonstrate only infrequent use by few

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[4] While defendant focuses on the defendants' express denial of responsibility in *Ambs*, that was one factor among many that this Court considered. See *Ambs*, 255 Mich App at 653-655

[5] Defendant argues that plaintiffs failed to make the threshold showing of an intent to abandon, and that "[i]t is undisputed that the Road Commission has always intended to retain jurisdiction and control over the right-of-way and has taken actions consistent with that intention." However, considering the evidence cited above, there at least is a question of fact regarding whether defendant intended to abandon this right of way.

[6] Defendant also cites an unpublished opinion of this Court to argue that the trial court correctly ruled in its favor. Not only does an unpublished opinion lack precedential value, MCR 7.215(C)(1), it is distinguishable from the instant case because it did not involve the commission's initial certification and subsequent decision not to certify the road.

[7] Nancy Stockman attested that she had been riding her horse on the right of way "approximately two times per month for the past five (5) years." Christina Maher stated that she had been riding her horse on the right of way "approximately two times per month for the past fifteen (15)

individuals, and this Court has recognized that nothing in our caselaw "suggests that intermittent public use of a roadway will preclude a finding of abandonment." *Ambs*, 255 Mich App at 658.[8] While defendant also highlights aerial photographs, supposedly illustrating that use of the right of way by horseback riders is "clearly show[n]," we are unable to discern any such detail or horseback riders. Moreover, Stanley Frankel's testimony that he had not denied access to the right of way does not reveal how many members of the public have requested access or the frequency of use. Furthermore, the fence has been in place since 1989, and Stanley testified that the purpose was "[t]o finish the fence line, to keep horses in and to keep hunters out." This indicates that public use has been restricted, and controlled by the Frankels. Therefore, we find that there is a genuine issue of material fact regarding current and frequent public use.

III. CONCLUSION

Accordingly, the trial court erred when it granted summary disposition in favor of defendant. We reverse and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Cynthia Diane Stephens
/s/ Michael J. Kelly
/s/ Michael J. Riordan

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years." Virginia Janiszewski attested that she had been riding her horse on the right of way "approximately 2-3 times per week for the past 23 years."

[8] While defendant also relies on the affidavit of Debbie Hundt, that affidavit is not dated, signed, nor notarized. "[A]n unsworn, unsigned affidavit may not be considered by the trial court on a motion for summary disposition." *Gorman v American Honda Motor Co, Inc*, 302 Mich App 113, 120; 839 NW2d 223 (2013). As this Court may only consider "what was properly presented to the trial court before its decision on the motion[,]" *Pena*, 255 Mich App at 310, we may not consider Hundt's affidavit on appeal.